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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LELAND LESTER SHAVER,
Petitioner,

V.

BOB L. HUNTER, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

PETITIONER'S REPLY MEMORANDUM ON CERTIORARI

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PETITIONER'S REPLY MEMORANDUM ON CERTIORARI

Leland Lester Shaver, the petitioner herein, submits this memorandum in reply to the respondents' Brief in Opposition to the Petition for a Writ of Certiorari.

In their Brief in Opposition, the five neighboring property owners who are the respondents herein take the approach that the Questions Presented to this Court by Mr. Shaver are really not issues at all. They do this in two ways. First, nowhere in their Brief in Opposition do the neighbors discuss or even specifically mention the issues raised by Mr. Shaver, thereby implicitly treating them as non-issues. Second, in their few, vague references to Mr. Shaver's issues, the neighbors repeatedly concede that they do not oppose Mr. Shaver's position on those issues. *See, e.g.*, Brief in Opposition, at ii, iii, and 4 (parties "do not dispute" the issue on certiorari), *id.*, at 3, 4, and 6 (no party "now" urges the issue on certiorari).

The only conclusion that can be drawn is that the neighbors, trapped by the state appellate court's dubious resolution on federal

constitutional grounds of an issue that they had not even raised, have conceded the state appellate court's error on the federal issues presented to this Court.

To extricate themselves from the dilemma of conceding the lower court's legal error while preserving their victory, the neighbors argue that no Article III case or controversy now exists for this Court to adjudicate. Their basis for this argument is that no one is now arguing in support of the appellate court's holding concerning the federal constitutional issue and that, therefore, there is no case or controversy concerning that issue. Yet, the neighbors are compelled to acknowledge the obvious—that, whatever concessions they make on the federal constitutional issues, there remains a controversy between the parties. *See* Brief in Opposition, at 8("[T]his is a controversy between the parties . . .").

The neighbors' effort to use the Article III case or controversy jurisdictional requirement to avoid this Court's review of the concededly erroneous federal constitutional decision must be unavailing. The neighbors' concession of the state court's mistake does not remove the Article III underpinnings from this case. Despite its opportunity to do otherwise and despite the absence of an invitation for such an approach, the state appellate court, however cursorily, disposed of one of the independent grounds urged for reversal on federal constitutional grounds.*

Mr. Shaver now is subject to an adverse injunction concerning his use of the property in question, and his situation is attributable to the appellate court's disposition of the case, including its disposition on federal constitutional grounds. Therefore, the neighbors' argument that there now is no case or controversy is patently frivolous. The bankruptcy of the neighbors' case or controversy argument is manifest, because to accept it as a basis for refusing

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* Although the state appellate court could have chosen to rest its disposition of the third point of error before it on an adequate and independent state ground, thereby precluding this Court's review, it has not been—and cannot be—seriously contended that it did so. As explained at page 3 of the certiorari petition, the Amarillo court skipped over the state law question to decide the federal constitutional issue. The neighbors have conceded the accuracy of this characterization of the lower court's decisionmaking, *see* Brief in Opposition, at 2 (Mr. Shaver "correctly states" the course of proceedings and the results), and a review of the relevant part of the lower court's opinion, *see* Petition for Certiorari, at 7a, confirms its accuracy. Because the state court decision unambiguously rests on federal constitutional law, even though it could have rested on state law, this Court has jurisdiction to review it. *See Orr v. Orr*, 440 U.S. 268, 276-77 (1979).

review of the issues Mr. Shaver has presented the Court would hand all respondents to certiorari petitions a tactical way to preclude this Court's review of federal constitutional issues. Every respondent would need only to represent to the Court that it no longer contests the constitutional issue and, in that way, insure that the lower court's disposition of the constitutional issue remains impervious to review. The Court's Article III "case or controversy" jurisprudence does not require such an absurd result.

Especially after the neighbors' Brief in Opposition, the posture of this case is such that plenary view and summary disposition on the merits is warranted. The court below's judgment should be vacated, and the case remanded to that court for further consideration in light of the action taken by this Court. *Cf. Mayberry v. Pennsylvania*, 382 U.S. 286 (1965) (upon respondent's concessions, state court judgment vacated and case remanded for further consideration).

Respectfully submitted,

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